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In the Supreme Court of the United States

October Term, 1953

No. 311

UNITED STATES OF AMERICA, *Petitioner*

v.

FRANK FRYER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit remanding the case to the District Court with instructions to order petitioner to produce certain written statements of its witnesses for respondent's inspection, and to entertain a motion for a new trial to determine whether respondent was prejudiced by denial of a pre-trial inspection of such statements.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 6-11) are as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1953 (R.). On July 31, 1953, the time within which to file a petition for a writ of certiorari was extended by order of Mr. Chief Justice Vinson to and including September 5, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether written confessions and written statements of prospective Government witnesses are within the scope of the pre-trial inspection provision of Rule 17(c), F. R. Crim. P.

RULES INVOLVED

Rule 16, F. R. Crim. P. (18 U.S.C. foll. § 687) provides:

> DISCOVERY AND INSPECTION
>
> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or

obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17, F. R. Crim. P. (18 U.S.C. foll. § 687) provides in pertinent part as follows:

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

On December 17, 1951, a one-count indictment was filed in the District Court for the District of Columbia charging respondent, under the provisions of D.C. Code (1951) § 22-2401, with first degree murder (R. 1). On January 30, 1952, the trial court denied without prejudice respondent's motion for discovery and inspection, filed "pursuant to Rules 16 and 17, Federal Rules of Criminal Procedure" (R. 1-2). On February 6, 1952, respondent caused a subpoena to be directed to the Assistant United States Attorney in charge of the case commanding the latter to produce material almost identical with that sought on the unsuccessful motion including "Statements made by defendant" and "statements volunteered to Gov[ernment] by witnesses or third parties relating to this case" (R. 3). On February 8, 1952, he filed a motion under the provisions of Rule 17(c), F. R. Crim. P., "for an order making available to" him "all the items listed in the subpoena," on the ground that they were "indispensable" to him "to safely proceed to trial" (R. 4). On March 5, 1952, the trial court, on motion of the Government, quashed the subpoena (*ibid.*).

Following a trial by jury, respondent was convicted of second degree murder (R. 5) and on April 4, 1952, he was sentenced to imprisonment for a term of from 5 to 21 years (R. 5-6).

On appeal, respondent contended *inter alia*,[1] that the trial court erred in quashing the subpoena by which he sought, under the provisions of Rule 17(c), a pre-trial inspection of his confession and "statements volunteered to the Government by witnesses or third parties" (R. 7).[2]

The Court of Appeals, one judge dissenting on the ground that he could "not agree with the court's interpretation of Rule 17(c)," held that the "written statements of defendant and witnesses" (but not those of unidentified "third persons"), being "evidentiary" "documents," fall within the ambit of Rule 17(c), providing for a pre-trial inspection of documents, as construed by this Court in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (R. 8, 11).[3] It further held that respondent was not prejudiced by denial of a pre-trial inspection of his confession, which was desired for the purpose of aiding his psychiatrist in determining his mental capacity at the time the crime was committed, since the psychiatrist had ample opportunity at the trial to examine the confession, which had

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[1] Respondent also claimed error in the trial court's charge to the jury (R. 7).

[2] Respondent conceded, on appeal, "that the trial court did not err in holding these items outside the scope of Rule 16's discovery procedure," and that it "did not err in refusing to permit inspection of other items sought in his subpoena duces tecum" (R. 7, fn. 2).

[3] The court below was unanimous in its finding that the trial court did not err in its charge to the jury (R. 10-11).

been admitted in evidence five days before the psychiatrist testified in respondent's defense (R. 10). However, with respect to the statements of witnesses, the court stated that, since they were "not in the record," it could not determine whether respondent was prejudiced by a denial of their examination (*ibid.*). Consequently, it concluded that "justice is best served by remanding this case to the District Court with instructions to order production of these statements for inspection by appellant, and to entertain a motion for a new trial if one is presented within five days thereafter. If upon hearing such motion, the court determines that appellant was prejudiced, it should grant a new trial; otherwise, its present judgment should stand."

REASONS FOR GRANTING THE WRIT

The Court of Appeals, by making written confessions and written statements of witnesses subject to pre-trial inspection, has extended the scope of Rule 17(c), F. R. Crim. P., beyond the limits placed thereon by this Court in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214. In that case, this Court, although holding that "evidentiary" documents or materials "obtained by the Government by solicitation or voluntarily from third persons" may be reached for a pre-trial inspection by subpoena under Rule 17(c), expressly limited the right of discovery and inspection to the type of

2. If so what does 16 mean ("obtained from"? (must be subject to seizure or process? (So d/n include "statements"

material which, if obtained by process, would be discoverable under Rule 16 (*id.* at 219-221). The majority opinion below, by holding written confessions and written statements of witnesses to be evidentiary "documents" within the pre-trial inspection provision of Rule 17(c) has, in effect, done away with the limitations placed on discovery and inspection by Rule 16. Consistently applied, the majority decision below would lead to a federal practice of "discovery in the broadest terms," a practice which this Court expressly refused to sanction. *Bowman Dairy Co.* v. *United States, supra,* at 220. Thus, the Court of Appeals has misinterpreted an important decision of this Court in a manner which will seriously impede the administration of criminal justice.

Rule 16 provides for the discovery and inspection of the materials described therein provided they had been "obtained from or belonging to the defendant or obtained from others by seizure or by process." Thus, Rule 16 relates solely to materials which can be "impounded" or in some manner "appropriated" from the custody of a defendant, or from a third person by seizure or process. It, therefore, necessarily excludes confessions and statements of witnesses, because, they, when "obtained," are not in the ordinary sense of the term "appropriated" from their authors. *Shores* v. *United States,* 174 F. 2d 838, 843-844 (C.A. 8); *United States* v. *Chandler,* 7 F.R.D. 365 (D.

Mass.); Rule 16, F. R. Crim. P., *Notes of Advisory Committee;* Federal Rules of Criminal Procedure, New York University School of Law, Institute Proceedings (1946) pp. 166-167. Furthermore, written statements of witnesses are not within the purview of Rule 16, because their authorship cannot be subject to "seizure or process." See Dession, *New Rules of Criminal Procedure II,* 56 Yale L. J. (1947) 197, 220.

Since, therefore, the documents sought in the instant case are admittedly not the kind of documents which could be reached by Rule 16, they are not the kind of documents for which, under the *Bowman Dairy* decision, production could be demanded by subpoena under Rule 17(c). It is significant that, in the *Bowman Dairy* case, the subpoena involved, as this Court noted (p. 218), expressly excluded "narrative statements [of persons], and memoranda of interviews." This Court stated in the *Bowman Dairy* case (p. 220):

> It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms.

The decision below has accomplished precisely the result which this Court so carefully disclaimed as it object.

The term "evidentiary" as employed in the *Bowman Dairy* case means that the materials sought

for a pre-trial inspection are by their very nature "admissible as evidence" by either party and independently of the evidence adduced by the other party. It is an elementary rule that a statement of a witness is not admissible in evidence, save for purposes of impeachment or refreshing recollection after the witness has testified in contradiction of matter contained in his statement and after a proper foundation has been laid for its introduction. Cf. *Goldman* v. *United States,* 316 U.S. 129; *United States* v. *Krulewitch,* 145 F. 2d 76, 78-79 (C.A. 2). Even when thus used, such prior contradictory statements do not constitute affirmative evidence of the facts there set forth. *Bridges* v. *Wixon,* 326 U.S. 135, 153; *Ellis* v. *United States,* 138 F. 2d 612 (C.A. 8). The reliance by the court below on *Gordon* v. *United States,* 344 U.S. 414, 418, as grounds for including "written statements by a prosecution witness within the 'ordinary meaning' of the word 'document' " is misplaced. All that the *Gordon* case decided was that, in the particular circumstances of that case, where it was clear that the prior statements gave a different version of events from the one to which the witness was testifying, the documents shou'd have been made available to the defense *at the trial* for their traditional purpose of impeachment. The *Gordon* case in no way changed the rule that such statements, which are of course in a certain sense

documents, are not *per se* evidence and never become affirmative evidence.[4]

There is, of course, a wide difference between producing a document at the trial in relation to the particular testimony of a witness and permitting pre-trial inspection of all statements taken from all Government witnesses. The practical importance of the decision below to criminal practice is self-evident. If the decision below is allowed to stand, motions for pre-trial inspection of all statements may be expected to be routine procedure in all criminal cases. As this Court recognized in the *Bowman Dairy* case, this kind of "discovery in the broadest terms" was not the purpose of the Criminal Rules. The Rules, although intended to encourage disclosures through discovery, try to achieve a fair balance between the Government and the accused so as to bring about "fairness in administration" of criminal proceedings. Rule 2, F. R. Crim. P.; see also Yankwich, *Concealment or Revealment,* 3 F.R.D. 209, 210-211. The need for limited disclosures is not in order that the Government, by surprise through concealment, may have some advantage over the defendant. See Note, *Pre-Trial Disclosure in Criminal Cases,* 60 Yale

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[4] A confession is in a somewhat different category since it is in itself evidence unless excluded as involuntary or improperly obtained. But, as noted above, it is not the kind of evidence reached by Rule 16 and therefore not within the purview of Rule 17(c). The court below did not find error in the refusal to permit inspection of the confession.

L. J. (1951) 626. Rather, it is to prevent perjury, subornation and an opportunity to manufacture evidence.[5] Only recently, Chief Judge Vanderbilt in speaking for the majority of the New Jersey Supreme Court, in *State* v. *Tune* (22 Law Week 2027, July 21, 1953), which rejected "liberal discovery" practices in criminal cases, stated:

> * * * Such liberal fact-finding procedures are not to be used blindly where the result would be to defeat the ends of justice. In criminal proceedings, long experience has taught the court that often discovery will lead not to honest fact-finding, but to perjury and suppression of evidence.

Yet the decision of the court below is blazing a trail in the opposite direction under a claim of authority from this Court. Such an abandonment of the traditional common-law restrictions in discovery and such an extension of the Rules as interpreted by this Court obviously calls for review by this Court.

That review must be had at this time, despite the seemingly interlocutory nature of the judgment below. That judgment, although interlocutory in

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[5] Since it is usually impossible for either side to determine what impeachment will be called for until the opposing side has introduced its witnesses, "writings relating to possible rebuttal or impeachment are essentially in an area where the surprise element is unavoidable; and, moreover, desirable as a force tending to keep both sides within the narrow confines of the truth." *United States* v. *Schneiderman*, 104 F. Supp. 405, 410 (S.D. Cal.).

form, is final in relation to the question here involved. It holds that respondent did have a right to inspection of the statements of witnesses, leaving for decision only the issue of whether error in the denial of that right was in the circumstances of the case harmless. The question here presented is whether such right existed at all. Moreover, unless the question is reviewed at this stage of the proceedings, it may not be reviewed at all. If the District Court finds that the error was harmless, the Government would not be in a position to seek review. On the other hand, should the District Court find that there was prejudice and grant a new trial after inspection, the Government would have no right of appeal under 18 U.S.C. 3731. Similarly, in other cases, if District Courts on the authority of the decision below grant inspection, the Government has no right of appeal which would enable it to challenge such orders. Thus, this is a case where it is peculiarly appropriate that this Court exercise the jurisdiction which it unquestionably has[6] to review the judgment below despite its apparent interlocutory character.

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[6] The jurisdiction of this Court is not affected by the fact that the order of remand of the court below was not final. *Gay* v. *Ruff*, 292 U.S. 25, 30-31; *Aetna Casualty Co.* v. *Flowers*, 330 U.S. 464, 467; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 685, fn. 3. The power of this Court to review any "case" "in the courts of appeals," is not dependent upon the status of such case nor upon the issuance therein of any judgment, 28 U.S.C. 1254(1); *Forsyth* v. *Hammond*, 166 U.S. 506, 513.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner :

v. : Misc. No. 311

FRANK FRIER,
Respondent :

. . . . . .

OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

. . . . . .

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner :

v. : Misc. No. 311

FRANK FRIER, Respondent :

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit correctly held that respondent's confession, and the written statements of government witnesses to be called were subject to pre-trial, subpoena and inspection within the trial court's discretion pursuant to Rule 17(c) of the Federal Criminal Rules of Procedure absent a government showing in the record that compliance was "unreasonable," "oppressive," or would result in a "fishing expedition."

2. Whether a judgment of the Court of Appeals requiring the trial court to allow the issuance of a subpoena to determine whether prejudice resulted is an appealable order within this court's ruling, in Cobbledick, such as to give this court jurisdiction within this ruling in Cobbledick v. United States, 309, U.S. 323.

RULES AND STATUTES INVOLVED

Rule 17(c), F. R. Crim. P. provides in pertinent part as follows:

"(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Title 18, Sec. 3432 of the U.S.C. Annotated.

"Indictment and list of jurors and witnesses for prisoner in capital cases.

A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each veniremen and witness. June 25, 1948, c. 645, 62 Stat. 831."

Rule 16, F. R. Crim. P. provides:

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Title 22, Sec. 2401 of the D.C.Code.

Murder in the first degree - Purposeful killing - Killing while perpetrating certain crimes.

"Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, Sec. 798; June 12, 1940, 54 Stat. 347, ch. 339, Sec. 1.)"

STATEMENT OF THE CASE

On December 17, 1951 a one count indictment was filed in the District Court for the District of Columbia charging respondent with first degree murder, pursuant to the D.C. Code,

Title 22, Section 2401 (R. 1). On February 6, 1952 respondent, pursuant to Rule 17(c) of the Rules of Federal Criminal Procedure, served a subpoena upon a United States Attorney (R. 3 and 4).

The respondent consented to the quashing of all parts of the subpoena except that which related to the respondent's confession and to the written statements of witnesses the government intended to call during respondent's trial. (R.7). The trial judge, over respondent's objections, quashed the subpoena in its entirety. (R.4). Respondent was convicted of second degree murder and was sentenced to serve a term of 5 to 21 years in prison. (R. 5 and 6).

Notice of appeal was timely filed, and the Court of Appeals, in its opinion, ruled that no prejudice resulted as a result of the judge's order quashing respondent's right to inspect his written statement, since it was produced at trial but ruled that the court abused its discretion in not allowing respondent to inspect the written statements of government witnesses who were called at the trial. (R. 8 and 9). Since the written statements were not shown to respondent's counsel and were not part of the record of appeal, the Court of Appeals remanded the cause, ordered the trial judge to have the written statements of the government witnesses produced for the inspection of respondent's counsel, and allowed respondent's counsel 5 days after such inspection to file a new trial. (R. 10). The Court of Appeals stated further in its opinion that if substantial variance was put between the statements of the witnesses and their testimony at the time of trial, then the trial court should determine within its own discretion whether sufficient prejudice resulted to award a new trial. (R. 10). The government applied to this court for review.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The ruling of the Court of Appeals in a capital case, that

the written statements of government witnesses to be called at the trial are evidentiary and are documents within the purview of Rule 17(c) of the Rules of Federal Criminal Procedure and may be produced within the trial court's discretion absent a showing by the government that compliance would be "oppressive," "unreasonable," and a "fishing expedition," is in strict accordance with this Court's ruling in Bowman Dairy Co. v. United States.

The judgment of the Court of Appeals is interlocutory on its face and merely held that the trial court committed an error in quashing a portion of a subpoena, and hence, in its present posture, there is no case in controversy giving this Court jurisdiction within the purview of this Court's ruling in Cobbledick v. United States.

ARGUMENT

The ruling of the Court of Appeals, that written statements of government witnesses in a capital case are evidentiary and are subject to Rule 17(c) of the Rules of Federal Criminal Procedure, within the trial court's discretion absent a showing by the Court of "unreasonable, " "oppressive," or a "fishing expedition," is in strict accordance with this Court's ruling in Bowman Dairy Co. v. United States.

It is apparent that the government, in their petition for certiorari, has misinterpreted the obvious ruling of the Court of Appeals. The Court of Appeals has held, and correctly so, that the granting or a quashing of a subpoena under Rule 17(c) is, to a large extent, left to the discretion of the trial court. The court in its opinion points out that Rule 17(c) provides:

> "That the Court may direct that books, papers, documents or other objects designated in the subpoena," etc.

The court correctly held that the written statement of a defendant not subject to Rule 16, and the written statements of government witnesses also not subject to Rule 16, were evidentiary items which might be utilized for impeachment purposes, and were subject to pre-trial subpoena under Rule 17(c) of the Federal

Rules of Criminal Procedure. Respondent was indicted for first degree murder and was by statute entitled to the names of all government witnesses to be called at the trial, Title 18, Sec. 3432, U.S.C. Annotated. The court pointed out that as in United States v. Schneiderman, the words "may in Rule 17(c)" appeared in the preliminary draft of the rules as the last sentence of Rule 20(b). The appended note of the Advisory Committee explained:

> "The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the interests of fairness and for the purpose of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed." See F.R. Crim. P., Preliminary Draft, Pp. 104,105, 107 to 108.

It may well be that when the written statements of a government witness who testified against respondent are inspected, there will be no material variance from their testimony at the time of trial, and hence respondent will have incurred no prejudice. The Court of Appeals in the interest of fairness, and in compliance with the obvious wording of the rule has stated that the trial judge abused his discretion in not allowing the pre-trial inspection of the written statements of the witnesses who were to be called at trial, for it has held that the written statement is a document, or book, or paper, within the scope of Rule 17(c), and it has further held that inasmuch as it might contradict the testimony of a witness from the stand, it is evidentiary within this court's ruling in Bowman Dairy Co. v. United States (supra). The government, in their petition, seek to obviate this court's ruling in the Bowman Dairy Co. v. United States, (supra), and states that since the statements involved here are not subject to Rule 16, they are not subject to pre-trial subpoena under Rule 17(c), but this court definitively stated in the Bowman Dairy Co., supra, as set forth in the opinion of the Court of Appeals, (R.8):

> "There may be documents and other materials in the possession of the government not subject to Rule 16."

No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary.

The government, in their petition, states:

> "Thus, the Court of Appeals has misinterpreted an important decision of the court in a manner which will seriously impede the administration of justice."

The Court of Appeals' opinion, as set forth at (R.8), is designed to give full impact to this court's ruling in the Bowman Dairy Co., supra, and to eliminate the element of surprise, and to bring forth matters of an evidentiary nature which may help elicit the truth. The Court of Appeals stated, (R.8):

> "In following the Bowman view, which leads to the fullest presentation of facts, and away from a motion of trial as a game of combat by surprise, we hold that the written statements of defendant and witnesses fall within Rule 17(c)'s ambit."

If the written statement of the witness did not contradict his testimony at the time of trial, it, of course could not be utilized, but if there were serious contradictions showing the very probable presence of perjury, how can the discovery of such contradictions impede the administration of the criminal law?

All arguments in the government petition as to the scope of Rule 16 have no application to the instant case, for Rule 16 applies solely to materials taken from the defendant by seizure or by process.

The language of Rule 17(c) is plain and unambiguous, and it clearly states that:

> "The Court may direct production and inspection, etc."

The government seeks to obviate the clear language of the Rule by claiming there is no discretion in the trial judge to allow pretrial inspection of a written statement. In Iselin v. United States, 270 U.S. 245, p. 250-251, the court stated:

> "The statute was evidently drawn with care. Its language is plain and unambiguous. What the government seeks is not the construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably (possibly) by inadvertance, may be included within its scope. To supply omissions transcends the judicial function." Ex Parte Colette, 337, U.S. 55.

The Court of Appeals, in directing the trial judge to exercise his discretion and permit the inspection of the written statements of witnesses to be called at respondent's trial, is in accordance with the liberal interpretation of Rule 17(c) and this court's rule in Bowman Dairy Co. v. supra. Dean Wigmore also disapproved of the principle that a criminal trial was a game in which the prosecution's evidence would remain undisclosed until the trial. See 6 Wigmore on Evidence, 3rd Ed., 1940 Sections 1845, 1890, 1899, 1899(a), and 1863. This Court stated in Hickman v. Taylor that discovery procedures, provided by the rules are effective means of advancing the ends of justice, fairness and economy, when it stated:

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

The government is commanded by statute to give respondent the names of government witnesses to be called. It is monstrous to hear the United States Government seriously argue that their written statements, even if contradictory to their testimony, should be suppressed.

This was the very philosophy condemned by Judge Barnes in Bowman Dairy Co., supra, when he found the respondent, Hotchkiss, in contempt, and he (Judge Barnes) stated:

> "When the United States stands in this Court, or in any other court, and says that it has a right to maintain in the files of its officers, papers which may be relevant to the issues to be determined in Court...then the United States says that it has the right to do that and to refuse such information to parties litigant, then it is taking a long, long step toward a police state."

The ruling of the Court of Appeals is in conformity with the recent statement of Federal Judge Emerich Freed, formerly a United States Attorney, who stated:

> "...It should be the policy of the law to permit as broad a scope of inspection and discovery in criminal cases as applied in civil trials. I cannot believe that anyone will be deprived of a right by...means of unearthing the facts, whether those facts are pertinent in a criminal prosecution, or a civil action." See 33 American Bar Association Journal 1010, 1068.

It is interesting to note that the ruling of the Court of Appeals with its obvious intent to eliminate surprise and to elicit the truth in interpreting Rule 17(c) is in conformity with the statement of Wendell Berge, former Assistant Attorney General in charge of the Anti-Trust Division of the Department of Justice. In speaking on the pre-trial inspection of Rule 17(c), he stated it was decided to

> "reduce the element of surprise...and to facilitate the trial of cases." Berge. The Proposed Federal Rules of Criminal Procedure, 1943, 42 Michigan Law Review, 353.

The final sentence of Rule 17(c), which is the crux of the opinion of the Court of Appeals, authorizes district courts to permit inspection of subpoenaed documents 'prior to trial,' and also explained as follows in the Advisory Committee's notes to the preliminary and second preliminary drafts of Rule 17(c):

> "The last sentence provides for a method by which the Court may permit either side to inspect subpoenaed documents or objects under the supervision of the Court. It is inserted 'in the interests of fairness and for the purpose of preventing delay during the trial,' particularly in cases where numerous documents may have been subpoenaed." P.R. Crim. P., preliminary draft 1943, pp. 107-108; P.R. Crim. P., secondary draft 1944, p. 99. Rule 17(c) was Rule 20(b) of the preliminary draft, and Rule 19(c) of the second preliminary draft.

Rule 16 is not a limitation on Rule 17(c) because each rule has a separate and distinct function. There is no language in Rule 16 which expressly prohibits pre-trial inspection under Rule 17(c) of the material not subject to Rule 16. Rule 17(c) is a provision, the primary purpose of which is to implement the Constitutional right of an accused person to have compulsory process to obtain witnesses in his favor, as guaranteed in the Sixth Amendment. We call the Court's attention to the language of Justice Marshall in United States v. Burr, supra, 25 Fed. Case No. 14692d:

> "Now, if a paper be in possession of the opposite party, what statements of its contents or applicability would be expected from the person who claims its production, he not previously knowing its contents?...When a paper is in the possession of one party, it is com-

pletely in his power, and as required by the Court, very strong reasons must be given to justify its being withheld if it have any relation to the case."

There is further precedent for the rule of the Court of Appeals requiring the trial judge to exercise his discretion and require the production of written statements of witnesses to be called at trial. In Edwards v. United States, 312, U.S. 473, the trial judge had overruled the defendant's motion filed before trial to compel the government to produce a transcript of his testimony before the Securities and Exchange Commission. The motion was denied. This Court reversed and held that the transcript should have been produced, or at least that the trial court should have exercised its discretion to issue an order to show cause why all or a part of the transcript should not be produced. If the Edwards case were to be presented today, the transcript would not be available under Rule 16, since it was not taken by seizure or by process. It undoubtedly is evidentiary within the purview of Rule 17(c), and yet if the government's contention is correct that Rule 17(c) is limited to the items recoverable under Rule 16, the transcript would not be subject to pre-trial subpoena under Rule 17(c). The Edwards case was followed in Boehm v. United States, 123 Fed. 2nd, 791, where the Court stated;

> "Whenever it is timely presented to the Court by a defendant in a criminal case, that the transcripts of testimony of government witnesses against him, given before investigators, contain evidence material to his defense at the trial, and demand is made, therefore, that the Court should issue process for the production thereof and should examine the same, and should make its rulings as to the admissibility or use in the trial of any part of the whole matter in the light of the transcripts before the Court."

In making such rulings, the Court is bound to exercise sound judicial discretion to accord the defendant the fair trial to which he is entitled and at the same time to confine theprocedure to consideration of competent, relevant and material evidence. In the Boehm case, supra, Rule 16 would not have applied since the material sought consisted in narrative statements made by

government witnesses to government investigators, and therefore, Rule 17(e) would not apply either, if, as the government interprets it, it is bound by the limitations of Rule 16.

Respondent also asserts that other precedent for Rule 17(c), and it is the opinion of the Court of Appeals, Title 28, Section 1651(a) of the U.S.C. Annotated. That section conferred upon the Federal courts the power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practices and usages of law. This provision is applicable to subpoena duces tecum in criminal proceedings. Weinberg v. United States, 126 Fed. 2nd 1004.

1. We suggest to this Court that the ruling of the Court of Appeals for the District of Columbia Circuit is in conformity with this court's ruling in Bowman Dairy Co., supra, and this opinion furthers the purpose and intent of Rule 17(c) which is to elucidate the truth and not to suppress it. Therefore, this Court should deny the government's application for a writ of certiorari.

2. The judgment of the Court of Appeals remanding this cause for further proceedings is interlocutory on its face, and hence at this juncture, this Court lacks jurisdiction to review same. The government in their petition for certiorari state:

> "That judgment, although interlocutory in form, is final in relation to the question here involved."

The Court of Appeals has merely stated in their opinion and judgment that the trial judge should vacate that part of his order quashing the subpoena for the production of the written statements of the witnesses called at the trial. Thus, the Court's order is precisely within the purview of this Court's ruling in Cobbledick v. United States, 309, U.S. 323, 60 Supreme Court Reporter, 543. The Court, speaking through Mr. Justice Frankfurter, determined that the quashing of a subpoena duces tecum attached to a petitioner directing him to produce documents before a United States Grand Jury was not an appealable order.

The Court stated:

> "Such was the ruling in Alexander v. United States, 201 U.S. 117, 26 Supreme Court Reporter, 356, 50 L.Ed. 686. In that case, witnesses were directed to appear and produce documents before a special examiner designated by the circuit court to hear testimony in a suit brought by the United States to enforce the Sherman Law. Upon refusal to submit the documents called for in the subpoena, the United States petitioned the circuit court for an order requiring compliance. The petition was granted, and appeals were then allowed to this Court. These appeals were dismissed for want of jurisdiction. The grounds of the decision are best indicated in the language of the opinion:
>
> "'In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. But the court go farther, and punish the witness for contempt of its order,--then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case. * * * This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit.'" 201 U.S. at pages 121, 122, 26 S.Ct. at page 358, 50 L.Ed. 686.

Therefore, the judgment in question would not be ripe for this Court's review until the following occurred. The mandate for the United States Court of Appeals for the District of Columbia Circuit would issue, and the United States District Court would order the United States Attorney to produce the written statements in question. The United States Attorney, if so advised, could refuse to produce these written statements and would be adjudicated in contempt. At this juncture, this order would be final and reviewable. The United States Attorney would be adjudicated in contempt and thereby a case in controversy would put at issue the legality and correctness of the order of the District Court and the judgment of the Court of Appeals. This is precisely what happened to United States Attorney Hotchkiss in the Bowman Dairy Co., supra.

Therefore, in light of the argument above, the judgment of the Court of Appeals is interlocutory and this Court lacks jurisdiction to do same, and application of the United States Government for a petition for certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 311

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK FRYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

The Government earnestly requests this Court to reconsider its denial of the petition for a writ of certiorari in the above entitled case, because of the great importance of the question involved in the administration of criminal justice. The holding of the court below—that respondent was entitled as of right to examine signed statements of Government witnesses before trial, unless the Gov-

ernment could affirmatively show special circumstances rendering such compliance oppressive (R. 9)—represents a truly radical innovation in criminal practice which ought to be considered by this Court.

At the time the petition for certiorari was filed, we could merely speculate as to the effect of the decision on the conduct of criminal trials. By now, however, there is a sufficient history of actual practice in the District of Columbia Circuit, where the impact of the decision would be most immediately felt, to indicate that the speculation that the decision would have far reaching effects was amply warranted. The records of the United States Attorney for the District of Columbia show that in the period between the decision below on July 7, 1953, and November 23, 1953, there have already been filed 35 motions for inspection of the type sanctioned by the instant case, and this although no criminal trials are held in the District of Columbia during the month of August. The tempo will undoubtedly increase in the face of the denial of certiorari. In fact, in the week following the denial of certiorari five such motions have been filed.

It is evident that the decision below has been read by the bar as sanctioning exactly the kind of "discovery in the broadest terms" which this Court in *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, held was not the purpose of the rules. The motions for pre-trial inspection have not been confined to cases, like the instant one, where the charge is murder and a list of Government wit-

nesses is furnished to a defendant before trial. Motions seeking generally production before trial of written statements of *any witness whom the Government expects to call* have been made with respect to lesser criminal offenses, such as larceny, bribery, gambling offenses, etc. It has also become evident that there is confusion among the district judges as to the scope of the decision. Thus, as to cases involving crimes of lesser degree than murder, one judge has granted a motion for inspection of all written statements of witnesses the Government intends to call (*United States* v. *Caldwell,* No. 970-50), whereas another has granted permission to a defendant to inspect only his own statement and not that of witnesses (*United States* v. *St. Laurence,* No. 858-53).[1] The government, of course, cannot appeal from such orders.

While in the short period available to file a petition for rehearing, there has been time to check only the experience in the District of Columbia, it seems reasonable to believe that the decision below, involving as it does an interpretation of the Federal Rules of Criminal Procedure, rather than any statute or rule limited to the District of Columbia, will engender equal confusion in other circuits. It does not further the interests of orderly administration of criminal justice to permit such a state of confusion to continue when the issue is presently before this Court and can be definitely decided.

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[1] In murder cases inspection has generally been ordered. E.g. *United States* v. *Kitchen,* No. 235-51; *United States* v. *McQueen,* No. 1084-53; *United States* v. *Peterbark,* No. 1448-53.

The confusion among the local district judges stems, we believe, only in part from the lack of clarity in the decision below which, while recognizing that Rule 17(c) provides that the court "may" direct the production of documents before trial, reads "may" to mean "must" unless the Government can show that compliance would be unusually unreasonable and oppressive. More importantly, we believe the confusion arises from the difficulty in reconciling the decision below with well-established principles which have been recognized by the decisions of this Court as to the conditions which must precede the right of a defendant to demand production of the statements of a witness.

In the petition for a writ of certiorari we stressed the impossibility of reconciling the decision below with the disclaimer in the *Bowman Dairy* case of any interpretation of Rule 17 which would authorize "discovery in the broadest terms." We feel that we may not have made sufficiently clear the further impossibility of reconciling the decision below with the principles that were recognized and assumed by this Court in *Gordon* v. *United States,* 344 U.S. 414. This Court there held that production of signed statements by a witness should have been ordered *at the trial* where "by proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the con-

tradiction was as to relevant, important and material matters which directly bore on the main issue being tried" (344 U.S. at pp. 418-419). This Court then went on to say (p. 419): "The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." Thus this Court assumed that, under the broadest interpretation of the right to inspect signed statements, a foundation must be laid as a basis of a demand for production by showing that the previous statements contained matters contradictory to the testimony of the witness *on the stand.* This was the assumption of the courts in both *Asgill* v. *United States,* 60 F. 2d 776 (C.A. 4), and *United States* v. *Krulewitch,* 145 F. 2d 76, 79 (C.A. 2), cited by this Court in the *Gordon* case as authorities for the view that an accused is entitled to the production of such documents. Indeed, the *Krulewitch* case specifically pointed out, at p. 78:

> It is one thing to say that an accused shall in advance of trial have inspection of statements of witnesses taken by the prosecution in preparation of its case; it is another to deny him the benefit of so much of such statements as is shown to be inconsistent with the witnesses' testimony on the stand, and would impeach them. * * *[2]

[2] See *United States* v. *Ebeling,* 146 F. 2d 254, 257 (C.A. 2), in which the Second Circuit pointed out that a statement, not contradictory of the witness' testimony, was not admissible and therefore that it was not error for the trial court to refuse to permit the defendant to see it.

The *Gordon* case was interpreted as requiring that a foundation be laid at the trial by the Court of Appeals for the Fifth Circuit in *Shelton* v. *United States,* 205 F. 2d 806, 814, decided shortly after the decision in the instant case. There the court held that failure to permit a defendant to see a witness' statement was not reversible error "because the defense neither claimed nor showed what the Supreme Court held in the *Gordon* case was necessary", the fact of contradiction with testimony at the trial. The decision below, by requiring that a defendant be permitted to examine statements of witnesses before trial, eliminates the necessity for laying a foundation and thus conflicts with this Court's decision in *Gordon,* with the cases in other Courts of Appeals cited by this Court in *Gordon,* and with the decision of the Fifth Circuit in the later decided *Shelton* case. The *Gordon* case cannot be reconciled with the holding below that a defendant is entitled as of course to inspection of a witness' statement before trial, even though there is no way in which prosecution, defense, or the court can know whether the witness will contradict such statement at the trial.

Moreover, we wish to point out a consideration, not mentioned in the petition for certiorari, as to the manner in which the decision below interferes with the discretion of trial judges.

It has been the rule of the most liberal cases allowing inspection during a criminal trial that, where a proper foundation is laid, the witness' prior statement will be produced for inspection

by the trial judge who will determine in the first instance whether the defendant should properly be allowed to examine the document. *United States* v. *Krulewitch, supra; United States* v. *Ebeling,* 146 F. 2d 254, 257 (C.A. 2). The decision below takes away all such discretion from the trial judge. It requires that such statements be produced "for inspection by appellant" (R. 10), not for inspection initially by the judge. Thus, the barrier against fishing expeditions represented by the initial determination of the trial judge has been swept away by the decision below.

For all these reasons the decision below represents an extraordinary extension of the principles hitherto recognized as limiting the right of a defendant to pry into the Government's preparation of its case. The decision below represents a violent departure from the hitherto established rules as to the timing of such motions, the necessary foundation therefor, and the control thereof by the presiding judge. We sincerely believe that such a radical departure from established principles requires consideration by this Court.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER, 1953.

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that the grounds of this petition have not previously been presented.

ROBERT L. STERN,
Acting Solicitor General.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, :
Petitioner

v. : No. 311

FRANK FRYER,
Respondent :

OPPOSITION TO PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner :

v. : No. 311

FRANK FRYER :

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OPPOSITION TO PETITION FOR REHEARING

RULES INVOLVED

Rule 17, Federal Rules of Criminal Procedure (18 U.S.C. foll. Sec. 687) provides in pertinent part as follows:

SUBPOENA

* * * * * *

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

ARGUMENT

This Court should deny the Petition for Rehearing, for all the matter set forth in the petition was ruled on by this Court in the Petition for Writ of Certiorari filed by the petitioner, and an inspection of the record reveals that the United States Court of Appeals for the District of Columbia Circuit properly interpreted Rule 17(c) in conformity with this Court's ruling in Bowman Dairy Company v. U.S., 341 U.S. 214.

The petitioner seeks to invoke the jurisdiction of this Court

by claiming the opinion in the Court of Appeals in the instant case is in conflict with the ruling of the United States Court of Appeals for the Fifth Circuit, 205 F (2d) 806. A study of this case reveals that the assertion is frivolous. In the Shelton case the appellant acted as his own lawyer, was allowed to proceed in forma pauperis, and asserted on appeal that the Trial Judge committed in excess of 20 errors in the course of the trial. The Court of Appeals for the Fifth Circuit dismissed most of these allegations as patently frivolous. During the course of the trial the appellant Shelton demanded a written statement made by an F.B.I. agent. He did not file the motion pursuant to Rule 17(c); he did not issue a subpoena in conformity with the Rule; yet despite this, the Court of Appeals for the Fifth Circuit indicated that the Trial Judge committed error, but not reversible error. The Court stated:

> "Under these circumstances and on this record, it would be straining at a gnat to say that, if technically the Court should have permitted the defendant to inspect the documents, any substantial injury to him has occurred therefrom which requires reversal of the judgment."

Hence, it is apparent that a study of this case reveals that there is no conflict between the Shelton case and the instant case which would justify this Court in granting a Writ of Certiorari.

A study of the Petition for Rehearing filed by the petitioner states that the opinion of the Fryer case leaves no discretion with the Trial Judge, and hence obviates the intent of Rule 17(c), since Rule 17(c) uses the word "may" in referring to the production of documents. In support of this contention, the petitioner states that the alarming result of the Fryer case has resulted in pretrial inspection of written statements in the United States District Court for the District of Columbia in U.S. v. Caldwell, 970-50; U.S. v. Kitchen, 835-51; U.S. v. St.Lawrence, 858-53; U.S. v. Peterbark, 1448-53; U.S. v. McQueen, 1084-53.

The Court of Appeals in the instant case emphasizing that the trial court has discretion within Rule 17(c) to quash a subpoena

which is oppressive stated:

> "Quashing the subpoena and thereby denying appellant an opportunity before trial to inspect statements by defendant and witnesses was error. If compliance would have been "unreasonable or oppressive" or would have resulted in "a fishing expedition" as to additional items sought but not now in issue, the trial court should have modified the subpoena to include only material within 17(c)'s reach. No sound reasons were offered by the Government, and we can think of none, for precluding pre-trial inspection of such material."

The Court of Appeals has certainly vested discretion in the Trial Judge to quash a subpoena which is oppressive. The case is cited by the petitioner where cases in which trial judges decided that the Government had not shown the subpoenas in question were oppressive. However, in U.S. v. George T. Jordan, Crim. No. 73096, and U.S. v. James W. Thompson, et al., Crim. No. 1550-52, the District Court exercising its discretion decided the subpoena was oppressive and denied the defendants the right to inspect the written statements.

The ruling of the Court of Appeals has simply emphasized this Court's ruling in the Bowman case, supra, and vests complete discretion in the Trial Judge to quash a subpoena if the Government shows it is oppressive and to allow the subpoena to issue if there are no valid reasons for quashing it other than the age-old cry of "a fishing expedition." U.S. v. Krulewitch, 145 F (2d) 76; Asgill v. U.S., 60 F (2d) 776, and Gordon v. U.S., 344 U.S. 14, are not in point for they all involve production of written statements during the course of a trial and do not involve the construction of Rule 17(c), and the production of a written statement in advance of trial.

THEREFORE, in light of the argument above, the ruling of the Court of Appeals for the District of Columbia Circuit is a correct interpretation of the Court's ruling in the Bowman Dairy Co. case, supra, it is a correct interpretation of Rule 17(c) which vests complete discretion in the Trial Judge, and this Court should deny the petition for a rehearing.

CONCLUSION

The ruling of the Court of Appeals for the District of Columbia Circuit in the instant case promotes justice and fairness in the Federal Rules of Criminal Procedure. It prevents "a fishing expedition" and by the same token it allows an accused, in advance of trial, to inspect a written statement which is of evidentiary character within the scope of Rule 17(c) of the Rules of Federal Criminal Procedure. If any reasons are shown why the production of the statement is oppressive and the party asserting the oppressivness can demonstrate it to the Trial Judge, then the subpoena will be quashed. The ruling is a correct and fair one and this Court should deny review.

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